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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 973

ESLER R. LANE, C. A. RICHMOND, F. A. GODDARD AND RALPH W. THOMAS, constituting the Creditors' Committee of Haytian Corporation of America,

Petitioners,

—against—

HAYTIAN CORPORATION OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

SYDNEY KRAUSE,
Counsel for Petitioners.

Fort Orange Press, 504 Union Street, N. Y. C.

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No.

ERLE R. LANE, C. A. RICHMOND, F. A. GODDARD and RALPH W. THOMAS, constituting the Creditors' Committee of Haytian Corporation of America,
Petitioners,

—against—

HAYTIAN CORPORATION OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals, for the Second Circuit, and Brief in Support Thereof.

Petitioners respectfully pray that a writ of certiorari issue to review an order of the Circuit Court of Appeals, for the Second Circuit, modifying by a unanimous court and remanding to the referee for further proceedings not inconsistent with the opinion of the Circuit Court, an order of the United States District Court, for the Southern District of New York, remanding the proceedings to the referee.

Opinions Below.

The opinion of the District Court (R., fols. 652-671) is reported in 33 F. Supp. 171. The opinion of the Circuit Court of Appeals (R., pp. 255-266) is reported in 117 F. (2d) 216. The opinion of the Circuit Court of Appeals was written by Judge Charles E. Clark.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on the 3rd day of February, 1941 (R., pp. 273-4). The jurisdiction of this court is invoked under §240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 USCA §347).

Questions Presented.

The questions presented are:

(1) Whether the lower court has properly determined the functions of the official committee provided for (§338) in an Arrangement proceeding initiated under Chapter XI of the United States Bankruptcy Act, as amended (said official creditors' committee is sometimes referred to in this petition and the accompanying memorandum as the Statutory Committee); and

(2) The extent to, and the kind of services for which agents appointed by such a Statutory Committee may be compensated in the Arrangement proceeding.

Statutes and General Orders Involved.

The statute involved is that portion of the United States Bankruptcy Act relating to the appointment of the Statutory Committee (§338) and to the compensation of its agents (§337(2)).

Statement.

The debtor, Haytian Corporation of America, was a holding company, organized under the laws of the State of Delaware, which operated through a number of wholly owned subsidiaries (R., fol. 655). It con-

ducted the largest business in the Republic of Haiti and was engaged in the production of sugar and by-products, such as rum, molasses and alcohol (R., fol. 655).

A bond issue of some $3,000,000 of bonds, publicly held by a large number of bondholders, was coming due on December 31, 1938 (R., p. 258). Since the company could not pay the principal or accrued interest of approximately $2,200,000 some form of reorganized capital structure was necessary (R., p. 258).

For some years prior to the maturity date a committee consisting of Arnold R. Hanson, Sanford Griffith and Eliot E. Berkwit, known as the Hanson Committee, had been organized and had been in communication with the holders of the company's bonds and with the debtor with reference to the latter's affairs (R., fols. 23-4).

On October 14, 1938 the debtor filed its petition for relief under §322 of Chapter XI of the Bankruptcy Act (R., fol. 3). Shortly after the filing of the petition on October 27, 1938, a committee, known as the Wales Committee, was organized on behalf of bondholders (R., fols. 36-7). This committee represented substantial interests and consisted of Leonard A. Wales, Nathaniel H. Glidden, Walter F. Jarvis and Alexander H. McLanahan (R., fol. 37). The sum total of the Hanson and Wales Committees' representation of bondholders amounted to approximately $1,300,000 (R., fols. 10-11).

There were some differences of opinion as between these two informal committees (they are called informal committees to distinguish them from the Statutory Committee, which was subsequently appointed), during the early stages of the proceedings

as to the kind, character and nature of the securities which should be issued by the reorganized debtor. However, both committees had a common goal in that they were attempting to obtain for the bondholders of the company an interest commensurate with their position at the time.

Insofar as possible, the committees attempted to work together rather than at loggerheads and by prearrangement, at the first meeting of creditors, held pursuant to §334 of the Bankruptcy Act, a Statutory Committee was appointed pursuant to §338, consisting of Erle R. Lane, C. A. Richmond, F. A. Goddard and Ralph W. Thomas (R., fols. 10-11). Two of these individuals were suggested by the Hanson Committee and two by the Wales Committee but none of the members was a member of either of the informal committees.

The Statutory Committee adopted the following resolutions shortly after its appointment (R., fols. 12-16):

> "WHEREAS the Haytian Corporation of America Bondholders Committee composed of Leonard A. Wales, Nathaniel F. Glidden, Walter F. Jarvis and Alexander H. McLanahan and the Haytian Corporation of America Noteholders' Protective Committee composed of Arnold Hanson, Sanford Griffith and Eliot E. Berkwit, by virtue of the work heretofore performed by them which has been described to this Committee, are in a position to obtain from the holders of bonds of Haytian Corporation of America assents to the modified plan of arrangement which may be recommended by those committees and their adherence and co-operation will be of substantial value to

this creditors' committee in connection with the proceedings in which this creditors' committee was appointed, Now, Therefore, it is

RESOLVED that the Haytian Corporation of America Bondholders' Committee and the Haytian Corporation of America Noteholders' Protective Committee, be and they are each of them employed by this Committee as its agents for the purpose of continuing negotiations with the debtor, for the purpose of agreeing upon a final plan of arrangement for the debtor, and for the purpose of soliciting assents to such plan when agreed upon, and to take any other action or steps deemed necessary for the purpose of securing the approval of such plan by the bondholders.

* * * * * * * *

FURTHER RESOLVED that this Committee, subject to the approval of the Court, shall pay to the said Bondholders' and Noteholders' Committees and to the attorneys for this Committee their expenses and disbursements, as well as the reasonable value of the services rendered by each of them, including the value to this Committee of the adherence and co-operation of said Committees based on the work heretofore done by them."

The members of the Hanson Committee had performed substantial services prior to the appointment of the Statutory Committee, having been in the field for several years prior to the filing of the Arrangement proceeding (R., fol. 30). They were fully familiar with the history, method of operations, and manner of conducting the debtor's business. The background that had been acquired by the members

of the Hanson Committee through their prior participation would necessarily have had to have been acquired after the appointment of the Statutory Committee if the members of the Hanson Committee had entered the case for the first time at that point (R., fol. 30). The members of the Wales Committees similarly performed services prior to the appointment of the Statutory Committee, running over a period of about six weeks (R., fols. 36-9).

The members of the informal committees, in addition to the services performed prior to the appointment of the Statutory Committee, performed extensive services from on or about December 6, 1938 to November, 1939. These services are set forth in the Statutory Committee's petition and the supporting affidavits (R., fols. 8-102). As a result, in large measure, of the services rendered by the individual members of the Hanson and Wales Committees acting on behalf of the Statutory Committee during the period of about a year, a Second Modified Arrangement was formulated, submitted to creditors by the debtor and the necessary assents obtained to permit its confirmation (R., fols. 16-7, 30-1, 52).

On November 15, 1939 an application for reimbursement of expenses and disbursements was filed by the Statutory Committee with the referee (R., fols. 8-21). (The members of the Statutory Committee did not seek compensation as such.) After hearings the referee handed down a decision denying in its entirety the application of the Statutory Committee for reimbursement of its expenses and disbursements (R., fols. 562-612).

Upon a petition to review to the District Court (R., fols. 613-20), the referee's order was reversed (R., fols. 652-678) and the proceeding was remanded to

the referee "to take further proof and to determine the reasonable value of the services rendered and disbursements incurred" (33 F. Supp. 171).

The debtor appealed as of right to the United States Circuit Court of Appeals, for the Second Circuit, which modified the order of the District Court and remanded the proceedings to the referee for further proceedings not inconsistent with its opinion (R., p. 266). The Circuit Court, in its opinion (117 F. 2d 216 at p. 221), limited

(1) the functions of the Statutory Committee in an Arrangement proceeding; and

(2) the items of service for which such Committees' agents could obtain compensation

to such an extent as to impair seriously the orderly administration of Arrangement proceedings.

Moreover, the lower court held further (p. 221) that even though services fall within the classifications of allowable services, they would not be compensable if rendered prior to the appointment of the Statutory Committee.

Specification of Errors to be Urged.

The court below erred

(1) in holding (pp. 220-1) that the functions of the Statutory Committee in an Arrangement proceeding correspond to those of the committee authorized in §44(b) of the Bankruptcy Act and that the allowable expenses of such Statutory Committee must be limited to those incurred by it in passing judgment

upon the Plan and in making that judgment known to the debtor and the creditors for appropriate action by him or them;

(2) in holding (p. 221) that the services of the Statutory Committee's agents in the active solicitation of assents to the proffered Plan would not justify any allowance; and

(3) in holding (p. 221) that expenses incurred prior to the Statutory Committee's appointment are not allowable "since they are designed to facilitate advance acceptance of the Plan rather than to aid impartial judgment upon it".

Reasons for Granting the Writ.

This case presents, for the first time, an important question vitally affecting the administration of that portion of the Bankruptcy Act dealing with Arrangements, Chapter XI, which has not been, but should be, settled by this court. The enactment of Chapter XI of the Bankruptcy Act has altered radically the administration of bankruptcy proceedings. Since the enactment of the Chandler Act and during the period from September 22, 1938 to March 21, 1941 there were 645 Arrangement proceedings as against 51 Reorganization proceedings filed in the Southern District of New York. It will be observed, therefore, that a very substantial proportion of bankruptcy administration in the largest district in this country is being had under Chapter XI of the Act. Chapters I to VII, governing what are sometimes referred to as bankruptcy liquidations, contain sections which give to the liquidation proceeding an adversary character. Thus, §44(a) provides for the election or appointment of a

trustee. §44(b) provides for the appointment of a creditors' committee. Provision is made for the employment of attorneys (General Order XLIV) and for their compensation (§§62(c), (d) and 64(a)1).

In reorganization proceedings under Chapter X provision is made for the mandatory appointment of trustees in larger cases (§156) or an examiner in cases where the debtor is continued in possession (§168). Moreover, even where no trustee or examiner is appointed the stimulus for an adversary proceeding is furnished in part by §242, which provides for the compensation of committees and representatives of creditors and stockholders and their attorneys or agents "in connection with the administration of an estate in reorganization or in connection with a Plan approved by the Judge, whether or not accepted or finally confirmed". Chapter X provides for the permissive or mandatory intervention of the Securities & Exchange Commission (§208).

Chapter XI is singularly lacking in comparable provisions. §338 provides that upon dismissal of an Arrangement proceeding "* * * the creditors * * * if a trustee has not previously been appointed, may nominate a trustee who shall *thereafter* be appointed by the court in case it shall become necessary to administer the estate in bankruptcy as provided under this chapter".

The trustee's office, therefore, does not come into being until it becomes necessary to administer the case in bankruptcy.

There are only two sections in Chapter XI which can possibly be interpreted so as to furnish the mechanism necessary for imparting to Arrangement

proceedings an adversary character. §338 further provides:

> "At such meeting the creditors may appoint a committee if none has previously been appointed under this Act * * *."

§337 provides:

> "At such meeting, or at any adjournment thereof, the judge or referee shall, after the acceptance of the arrangement——
>
> (2) fix a time within which the debtor shall deposit * * * the actual and necessary expenses incurred in connection with the proceedings and the Arrangement by the Committee of Creditors and the attorneys or agents of such Committee, in such amount as the court may allow."

The lower court has so interpreted these sections as to deprive Chapter XI of its adversary character. First, it has limited the functions of the committee to those functions as set forth in §44(b) of the Act. Secondly, it has limited the kind of service for which the committee's agents can be compensated to such an extent as to hinder and impede the effective functioning of the committee. As a practical matter, the limitation of compensation does not *per se* hinder and impede the functioning of the Committee but it needs no extended argument that if the Committee's agents cannot be paid to perform necessary services, such services as a practical matter will not be performed.

If Chapter XI is to continue as an effective medium for the adjustment of insolvent debtors' affairs, this court can and should define the functions of the Ar-

rangement committee sufficiently broadly so as to permit the Committee

(1) to take an active part in the proceeding with respect to problems of administration;

(2) to examine into the affairs of the debtor prior to the filing of the petition;

(3) to act as a control upon the debtor in the decision of its business problems during the proceeding;

(4) to negotiate with the debtor in connection with the Plan of arrangement which has been offered;

(5) to negotiate for the alteration or modification of the arrangement proposed consistent with the rights of creditors;

(6) to oppose a plan of arrangement which the committee regards as unsatisfactory; and

(7) to endeavor to consummate a Plan of arrangement which the Committee believes affords adequate protection for creditors, which would include the solicitation of assents.

This enumeration is not intended to be complete and should include any additional items that might arise during the course of the proceeding where the interests of the debtor and of the creditor body would come into conflict.

The power of the Statutory Committee, where not inconsistent with the language used by Congress in drafting the statute, must and should be defined and delineated in such manner as to enable Chapter XI

to continue as an effective medium for adjustment of insolvent debtors' affairs. This question is of such general importance that it should be settled by this court.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

SYDNEY KRAUSE,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

Argument.

POINT I.

The functions of a statutory committee are not similar to those of a committee appointed under §44(b) in ordinary bankruptcy. The allowable expenses of a statutory committee should not be limited to those incurred by it in passing judgment on the plan and in making that judgment known to the debtor and creditors.

The lower court, in its opinion, has held that the committee referred to in §338 of the Bankruptcy Act corresponds to the committee authorized under §44(b). In that connection the court, in its opinion, cited with approval Judge Chestnut's opinion in the *Matter of Credit Service, Inc.,* 31 F. Supp. 979. This holding of the lower court has created so much uncertainty as to the true function of the Statutory Committee and its proper place in the Arrangement proceeding as to justify a careful examination of that problem.

Contrasting the committee appointed in bankruptcy liquidation, provided for in Chapters I to VII, and the committee in Arrangements, Chapter XI, we find that §44(b), which defines the functions of the bankruptcy committee (we use this phrase to distinguish it from the Statutory Committee in Arrangement proceedings), provides that that committee may

(1) consult and advise with the trustee in connection with the administration of the estate;

(2) make recommendations to the trustee in the performance of his duties; and

(3) submit to the court any question affecting the administration of the estate.

The functions of the bankruptcy committee are thus clearly defined. In the great majority of proceedings filed under the Arrangement statute, the Arrangement proceeding is initiated as an original proceeding. That is to say, that although provision is made (§321) for filing an Arrangement petition in a pending bankruptcy proceeding, in actual practice §321 has been invoked in comparatively few cases. Therefore, in only a few cases is there a trustee serving at the time when an Arrangement proceeding is initiated.

§338 provides that if a trustee has not been previously appointed, creditors may nominate one at the first meeting of creditors, "who shall thereafter be appointed by the court in case it shall become necessary to administer the estate in bankruptcy". In other words, the trustee's office does not come into being unless and until it becomes necessary to administer the case in bankruptcy.

Since there is no trustee with whom the Arrangement Committee can consult or advise or to whom the Committee can make recommendations, the only function of the bankruptcy committee, therefore, that can possibly be said to have any application in an Arrangement proceeding if "the functions and obligations of the committee" "correspond to the committee authorized by §44(b)" is the third item of the latter section, which provides that the committee may submit to the court any question affecting the administration of the estate.

It is clear, however, that Congress could not have intended so narrow and tenuous a position for the Arrangement committee, for, otherwise, there would have been no necessity for providing in §337(2) for "the actual and necessary expenses incurred in connection with the proceedings *and the arrangement* by the committee of creditors and the attorneys or agents of such committee".

It would seem that if the exclusive function of the Statutory Committee in an Arrangement proceeding is merely to submit to the court any questions affecting the administration of the estate, there was no reason for providing for the actual and necessary expenses incurred in connection with the proceeding and the arrangement (1) by the committee of creditors, (2) by the attorneys, or (3) by the agents of such committee.

Perhaps we are laboring this point unnecessarily but it does seem from an examination of the Arrangement statute that it could not possibly have been the intent of the framers of this legislation that the functions of the Arrangement committee corresponded to the functions of the bankruptcy committee. Once this premise is accepted, it is appropriate to examine §§337 and 338 to determine the intent of Congress in the provisions for the Arrangement committee.

As we have already pointed out, in the normal Arrangement proceeding there is no trustee and except in unusual cases, where a receiver or custodian is appointed (§332), there is no officer of the court charged with the responsibility of supervising the proceeding. Certainly that is not within the province of the referee, who, under the statute, is the court (§1(9)). It would seem that the Arrangement committee, provided for in Chapter XI, is the only de-

vice by which there can be imparted to an Arrangement proceeding an adversary character.

This court has commented on this precise deficiency in Chapter XI in *Securities & Exchange Commission* v. *United States Realty & Improvement Company,* 310 U. S. 434, at page 450. In that case Mr. Justice Stone, in the course of his opinion, contrasting the protective provisions of Chapter X with those of Chapter XI, said:

> "No comparable safeguards are found in chapter XI. Every phase of the procedure bearing on the administration of the estate and the development of the arrangement is under the control of the debtor. The process of formulating an arrangement and the solicitation of consent of creditors, sacrifices to speed and economy every safeguard, in the interest of thoroughness and disinterestedness, provided in chapter X. The debtor is generally permitted to stay in possession and operate the business under the supervision of the Court, §342, 11 USCA §742, and a trustee is provided for only in the case where a trustee in bankruptcy has previously been appointed and is in possession, or if 'necessary' a receiver may be appointed. §332, 11 USCA §732. The debtor proposes the arrangement, §§306(1), 323, 357, 11 USCA §§706(1), 723, 757, and the only opportunity afforded the creditors in respect to the proposed plan is to accept or reject it as submitted by the debtor."

Further on in his opinion, at page 451, Mr. Justice Stone said:

> "There are no provisions for an independent study of the debtor's affairs by court or trustee,

> or for advice by them to creditors with respect to their rights or interests in advance of their consent to the arrangement. Committees of the creditors are permitted, §§334, 338, 11 USCA §§734, 738, but there is no restriction on or supervision over their selection and conduct as in chapter X. The arrangement may be consummated at the conclusion of a single creditors' meeting. The Court in passing upon the arrangement, is without the benefit of investigation and study by the trustee or Commission, which Congress has required in reorganization proceedings under chapter X, and is then faced with the fact that a majority of the creditors have already accepted the plan."

It would seem clear that the function of the Statutory Committee in an Arrangement proceeding was intended by Congress to be much broader and much more substantial than that of the bankruptcy committee (§44(b)), which is only auxiliary to the trustee.

We respectfully submit that this court is faced with the problem of interpreting Chapter XI of the Act so as to constitute it a medium for orderly and effective administration. It would seem clear that if the function of the Statutory Committee is merely to submit to the court any questions affecting the administration of the estate, then it is only in connection with this function that the attorneys and agents may be employed and compensated and it is only in connection with this function that the actual and necessary expenses incurred could be recovered. The greater part of the services of the committee intended under the Arrangement statute, even when performed by attorneys and agents, must go unrewarded under this narrow interpretation. This, in

turn, means either that the door is open in Arrangement proceedings to extensive fraud and chicanery on the part of the debtor or to the unrestricted appointment of receivers so that some measure of supervision and control over the debtor's affairs can be had while the proceeding is pending.

There would seem to be no logical argument against the Arrangement committee taking an active part in the conduct of the administration of the estate. There is no good reason why the committee should not have an active voice in the supervision and continuation of the debtor's business during the time that the Arrangement proceeding is pending. The Committee should have the right to conduct examinations to determine whether the debtor has committed any act which would bar his discharge since under §366(4) the commission of such act would prevent confirmation of an Arrangement (see also §366(5)). However, to say that services of this kind must go unrewarded is to say, in effect, that they will not be performed.

This court, without doing violence to any of the provisions of the statute and within the language thereof, can and should define the functions of the Arrangement committee sufficiently broadly so as to permit the committee to perform the functions set forth in the petition herein (p. 11).

The lower court has held (p. 221) that the allowable expenses of the Statutory Committee "must be limited to those incurred by it in passing judgment upon the plan and in making that judgment known to the debtor and the creditors for appropriate action by him or them".

We have already noted the conspicuous omission in the provisions of Chapter XI for imparting an

adversary character to Arrangement proceedings unless §§337 and 338 are liberally construed. The functions of the committee, as defined by the lower court, exclude it from participation in a variety of matters which arise during the course of the proceeding. In a majority of cases the debtor is continued in possession. Unless the committee is given some voice in the actual running of the business, creditors in many cases will have no recourse other than the application for the appointment of a receiver, with the attendant expense that such a step would entail. It is unreasonable to expect individual creditors to assume the burden of supervising the proceeding, including the retention of attorneys and accountants.

The committee is admirably suited to perform this function and we respectfully submit that without doing violence to any of the provisions of the statute and within the language thereof, this court should interpret the functions of the committee as we have indicated hereinabove.

This court has pointed out in *United States* v. *Hutcheson,* decided Feb. 3, 1941, 85 L. Ed. 424 at 426, "the importance of giving 'hospitable scope' to Congressional purpose even when meticulous words are lacking".

The lower court has expressly excluded the services rendered by agents of the Statutory Committee in the active solicitation of assents to the proffered plan on the ground that these are tasks within the compass of the Committee's own duty or are rendered on behalf of the debtor. This, we submit, is not a correct statement of fact. The consummation of the plan is, of course, of interest to the debtor

since the fact that the debtor offers the plan is an indication of the fact that it regards the consummation thereof to be in its own interest. Once a satisfactory plan has been negotiated, however, the consummation thereof is just as much in the interests of creditors as in that of the debtor.

POINT II.

The services rendered prior to the Statutory Committee's appointment by persons who the Committee makes its agents and whose services are of value in the administration of the estate are properly compensable.

The lower court has held that "expenses incurred prior to the Committee's appointment are not allowable since they are designed to facilitate advance acceptance of the plan rather than to aid impartial judgment upon it".

In point of fact, services rendered before the Committee's appointment, in the majority of cases, are by no means designed to facilitate advance acceptance of the plan. In practice, in the great majority of cases, the negotiations that precede the election of the Arrangement committee are devoted to an examination into the debtor's affairs with a view to a determination of whether the Plan, which has been filed simultaneously with the petition initiating the proceeding (§323), is fair. Such examination is not usually confined solely to an investigation as to whether a liquidation of the existing assets would result in a more favorable distribution to creditors than the provisions of the proffered plan. They extend to a consideration of the prior history and

conduct of the debtor. Express provision for this phase of the administration in a Reorganization Proceeding is contained in Chapter X (§167). Notwithstanding the absence of a comparable section in Chapter XI, it would seem that the committee of creditors should be permitted to perform this precise function, which either the trustee or examiner would perform in a Chapter X proceeding. The examination into the prior history and conduct of the debtor is as important in an Arrangement proceeding (see §366(4)) as it is in a Chapter X proceeding or in an ordinary liquidation proceeding. The payment of preferences and fraudulent transfers prior to bankruptcy may have a material bearing on whether a plan is fair. So has the question of whether the debtor is entitled to a discharge. Study and investigation must be made of such situations and the plan weighed in the light of possible realization on causes of action. Who is to perform these services in an Arrangement proceeding unless the Statutory Committee is the agency through which they shall be performed? The lower court's characterization of these prior services as "designed to facilitate advance acceptance of the plan rather than to aid impartial judgment upon it", is, we submit, unrealistic and overlooks the essential functions which the preliminary investigation serves.

In concluding this point, we take the liberty of emphasizing the limitations that have been imposed on the Statutory Committee's functions if it cannot be paid for services rendered by its agents prior to the appointment of the Committee. It requires no extended discussion to make the point that the sooner investigation and examination are undertaken in the ordinary case the greater the chance of detecting fraud. If the Committee cannot receive re-

imbursement for its expenses for services rendered prior to its official appointment, its natural inclination would be to allow matters to rest until the first meeting. That may mean an interval of anywhere from ten days to three weeks (§334), depending on how soon the referee calls a first meeting of creditors. There can be no logical reason for refusing reimbursement to the Statutory Committee's agents for services rendered prior to its appointment where such agent's work if adopted not only contributed materially to the Committee's efforts but where the work would have had to be performed after the election of the Committee, if it had not already been completed. For example, why should the Committee be refused reimbursement for the expense of an accountant, who worked from the time of the filing of the petition down until the time when the Committee was elected? To be sure, if the accountant did the same work after the election of the Statutory Committee it would seem that his services would properly fall under §337(2). Nevertheless, the effect of the lower court's decision is to delay the commencement of the accountant's services until the appointment of the Statutory Committee, during which time important records might disappear or be altered with consequent substantial prejudice to the statute.

An official committee, which engages the services of agents before its election as an official committee, runs a two-fold risk: (1) that eventually it may not be elected the Statutory Committee; and (2) that the services of its particular agents may not be construed by the referee as having contributed to the eventual result. Although these are risks which the agents of the unofficial Committee must assume, there is no good reason for placing further deterrents upon the rendition by them of essential services.

The decision of this type of application should turn on the facts in each particular case. The referee observes at first hand every important step in an Arrangement proceeding. He is eminently qualified to decide whether the services performed before or after the appointment of a Statutory Committee are deserving of compensation. He should be given this discretion free of the arbitrary rule of chronology which prevents compensation for services rendered before the appointment of the Committee, regardless of their place in the entire administration.

The lower court, in arriving at its decision, has enunciated certain rules which affect the administration of Arrangement proceedings in substantial measure. We submit that these rules as enunciated do not state the intendment of Congress in the enactment of the Arrangement statute and we urge most earnestly upon this Court that a careful reexamination of the Statutory Committee's functions in Arrangement proceedings is both necessary and desirable to prevent injustice and to insure a structure within the confines of which the Arrangement statute can serve the purpose for which it was enacted.

CONCLUSION.

In order to resolve the grave doubt as to the correctness of the decision below and to furnish a guide in the administration of Arrangement proceedings, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

SYDNEY KRAUSE,
Counsel for Petitioners.

MAY 9 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 973.

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Petitioners,

—against—

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .

ERLE R. LANE, C. A. RICHMOND, F. A. GODDARD and RALPH W. THOMAS, constituting the Creditors' Committee of Haytian Corporation of America,
Petitioners,

—against—

HAYTIAN CORPORATION OF AMERICA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Circuit Court of Appeals (R., pp. 255-266) is reported in 117 F. (2d) 216. The opinion of the District Court is reported in 33 F. Supp. 171.

Jurisdiction.

The judgment of the Circuit Court was entered on the 3rd day of February, 1941 (R., pp. 273-4). The jurisdiction of this Court is invoked under §240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. §347).

Statute Involved.

The pertinent statute involved is the Bankruptcy Act as amended, and particularly Chapter XI thereof. Sections 337(2) and 338 of said Act are set forth in Appendix A.

Statement.

On October 14, 1938, respondent filed a voluntary plan of Arrangement, for the adjustment of its outstanding unsecured debenture indebtedness, under Chapter XI, §322 of the Bankruptcy Act (R., fols. 565, 654). Thereafter and on December 5, 1938, the statutory meeting of creditors, provided for in §334 of the Bankruptcy Act was held (R., fol. 565). At this meeting a Committee of creditors (herein referred to as the Statutory Committee) was appointed pursuant to §338 of said Act (R., fol. 566). The individuals elected to serve upon the Statutory Committee were Erle R. Lane, C. A. Richmond, F. A. Goddard and Ralph W. Thomas, the petitioners herein (R., fols. 10, 11).

The first two of these members were nominees of a voluntary and informal debenture-holders committee, known in these proceedings as the "Hanson Committee" (R., p. 257, fols. 24, 660). The Hanson Committee was formed as early as August of 1936, more than two years prior to the filing of the petition for Arrangement by respondent (R., p. 263, fol. 24). Mr. Lane and Mr. Richmond had been actively associated with this committee from 1936 to the date of their election to the Statutory Committee (R., fols. 10, 23).

The remaining two members of the Statutory Committee, Mr. Goddard and Mr. Thomas were nominees of a second informal debenture holders' committee

known as the "Wales Committee" (R., p. 263, fols. 10, 11), and had been associated with said committee since its formation on October 27, 1938, two weeks prior to the first meeting of creditors (R., fol. 36).

On the day the Statutory Committee was elected, that Committee passed a resolution reciting the employment of the "Hanson" and "Wales" committees and the respective members thereof, as agents of the Statutory Committee, for the purpose of continuing negotiations with respondent; agreeing upon a final plan of Arrangement for respondent; soliciting assents to such plan; and taking any other action or steps deemed necessary for the purpose of securing the approval of such plan by debenture holders (R., p. 263, fols. 14, 567).

Respondent, on May 12, 1939, filed a second modified plan of Arrangement (R., p. 256, fol. 310). On July 10, 1939, a hearing before the Referee was duly held, for the purpose of considering and passing upon this second plan (R., fol. 340). On July 14, 1939, an order confirming this second modified arrangement was made by the Referee, who retained jurisdiction under the terms of said order to pass upon the propriety of all applications for allowances thereafter filed in these proceedings.

The order of confirmation was entered upon consent of all interested parties, including the attorneys for petitioners, and the time to appeal therefrom has expired (R., p. 259, fol. 370).

Petitioners on November 15, 1939, filed an application with the Referee, seeking an allowance in the sum of $16,263.44 (R., p. 257, fol. 575). This claim was based upon compensation to be paid to the individual members of the "Hanson" and "Wales" committees, and certain solicitors and employees re-

tained by said committees, and miscellaneous disbursements thereof (R., p. 257, fols. 20, 33, 35, 56, 60, 69).

On February 2, 1940, after a hearing held for the purpose of considering the aforesaid application, an order was made, in conformity with the formal decision of the Referee, denying the application of petitioners (R., fols. 373, 562, 609).

Respondent had subsequent to the entry of the order of confirmation on July 14, 1939, taken the necessary steps to complete the Arrangement, and on or about February 3, 1940, the Arrangement was consummated.[1]

Petitioners petitioned the District Court for a review of the adverse ruling of the Referee (R., fol. 613), and upon such review, the District Court reversed and remanded the proceedings to the Referee for the taking of proof as to the reasonable value of the services claimed to have been rendered by petitioners (R., fol. 672) (33 F. Supp. 171).

Upon appeal by respondent to the United States Circuit Court of Appeals, for the Second Circuit, that Court modified the order of District Court in so far as it affected petitioners and remanded the proceedings to the Referee "for further proceedings not inconsistent with this opinion". (R., p. 266) (117 Fed. (2d) 216, 221).

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[1] The order of confirmation was entered upon consent approximately ten months before, and the arrangement was consummated in fact approximately three months before, the decision of this Court in *Securities and Exchange Commission* v. *United States Realty and Improvement Company*, 310 U. S. 434, decided May 27, 1940.

Reason for Denial of Writ.

This Court in the exercise of its discretion, should deny the petition for certiorari because:

> The Circuit Court properly defined the status of a Statutory Committee in Chapter XI proceedings, and the nature and extent of the compensable services which may be rendered by agents of such Committee, and the decision of the Circuit Court is in accord with the applicable decisions of this Court.

POINT I.

The Circuit Court with due regard to the nature of Chapter XI as a composition statute, properly limited and defined the functions of the Statutory Committee, and the extent to which said Committee might compensate its agents.

Petitioners assert that the Circuit Court erred because that court unduly limited and restricted the functions of a Statutory Committee in Chapter XI proceedings, and improperly curtailed the activities of such Committee by limiting the items of service for which such Committee might compensate its agents (Pet., p. 7). Petitioners argue further that the Circuit Court by its decision has deprived Chapter XI proceedings of what petitioners term "an adversary character" and by so doing, seriously impaired the orderly administration of arrangement proceedings under said Chapter (Pet., pp. 7, 10).

Petitioners suggest that the proper construction to be placed upon Chapter XI, and particularly Section 338 thereof, would be one which would vest in the Statutory Committee the broad powers and rights enumerated on page 11 of the petition. The sweep-

ing powers listed in the petition would permit general creditor participation, through the Statutory Committee, in all matters affecting the formulation of the arrangement, the conduct of arrangement proceedings, and the administration of the estate and affairs of the debtor. It is obvious that when petitioners speak of imparting to Chapter XI proceedings "an adversary character", they mean granting to creditors through the medium of the Statutory Committee the right not only of participation in, but of practically absolute control over arrangement proceedings. Petitioners ask this court (Br., p. 18) to "define the function of the Arrangement Committee sufficiently broadly so as to permit the Committee to perform the functions set forth in the petition herein (p. 11)."

Respondent respectfully submits that the argument advanced by petitioners is untenable because:

(a) such argument is based upon a misconception of the true nature of composition or arrangement proceedings; (b) such argument overlooks entirely the fact that Congress, in enacting Chapter XI, retained the fundamental composition theory of Section 12 of the Bankruptcy Act of 1898, and accordingly designedly refrained from incorporating therein any provision for general creditor participation in such proceedings or for imparting to such proceedings "an adversary character" in the sense in which that term is employed by petitioners; (c) such an argument overlooks the fact that related bankruptcy legislation, namely, Chapters I to VII and Chapter X[2] of the

[2] On page 9 of the petition, after referring to certain of the provisions which give to Chapters I to VII and Chapter X an adversary character, petitioners make the following concession: "Chapter XI is singularly lacking in comparable provisions."

Bankruptcy Act as amended, contains detailed and comprehensive provisions for imparting to such proceedings "an adversary character", rendering particularly significant the omission of comparable provisions in Chapter XI; and (d) such an argument, if sustained, would require this court, by judicial construction, to read into Chapter XI provisions which do not appear therein and which were designedly omitted therefrom by Congress.

Composition proceedings were formerly governed by Section 12 of the Bankruptcy Act of 1898 and Section 74 of said Act, as amended (47 Stat. at L. Chap. 204, §74). (*In re Realty Associates Securities Corporation,* 69 Fed. (2nd) 41; certiorari denied, 292 U. S. 628.) Congress in enacting Chapter XI repealed these two former sections and they are now wholly superseded by Chapter XI. However, it is well recognized that Chapter XI was derived from, and retains, the basic features of these composition sections.[3]

Under Chapter XI an individual or corporate debtor may now submit to unsecured creditors an arrangement for the adjustment of the debts of such creditors upon any terms and for any consideration (§356). The arrangement which it is now possible to effect under Chapter XI is broader and more comprehensive than that which was available under §§12 and 74, and the procedure for consummating such arrangement has been refined and clarified. Nevertheless, whatever the terms of such an arrangement, it

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[3] See:

Weinstein—The Bankruptcy Law of 1938—A Comparative Analysis (p. 259 et. foll.);

Re Romec Pump Co., 31 Fed. Supp. 389, 390;

Securities & Exchange Commission v. *United States Realty & Improvement Co.,* 310 U. S. 434, dissenting opinion of Mr. Justice Roberts, p. 464.

remains basically similar to the old offer of composition to creditors and proceeds from an offer by the debtor upon fixed terms to settle and adjust his debts. Such an offer is submitted to creditors for their consideration, to be accepted or rejected by them.

This Court has, on several occasions, distinguished between composition proceedings under Section 12 of the Bankruptcy Act of 1898 and adversary bankruptcy proceedings. In *Nassau Smelting & Refining Works, Ltd.* v. *Brightwood Bronze Foundry Company,* 265 U. S. 269, Mr. Justice Brandeis, who delivered the opinion of this court, declared at page 271:

> "Composition is a settlement by the bankrupt with his creditors. In a measure, the composition supersedes, and is outside of, the bankruptcy proceedings. *Cumberland Glass Mfg. Co.* v. *DeWitt,* 237 U. S. 447, 454, 59 L. ed. 1042, 35 Sup. Ct. Rep. 636. It originates in a voluntary offer by the bankrupt, and results, in the main, from voluntary acceptance by his creditors. It cannot be confirmed unless there has been such acceptance by the requisite majority."

Again, in *Myers* v. *International Trust Co.,* 273 U. S. 380, this court declared at page 383:

> "It is settled by the decisions of this court in *Cumberland Glass Mfg. Co.* v. *DeWitt,* 237 U. S. 447, 453, 454, 59 L. ed. 1042, 1045, 35 Sup. Ct. Rep. 636, and *Nassau Smelting & Ref. Works* v. *Brightwood Bronze Foundry Co.,* 265 U. S. 269, 271, 273, 274, 68 L. ed. 1013, 1015, 1016, 44 Sup. Ct. Rep. 506, that a composition is 'a settlement of the bankrupt with his creditors',—in a measure superseding and outside of the bankruptcy proceedings,—which originates in a voluntary

> offer by the bankrupt, and results, in the main, from voluntary acceptance by his creditors; that the respective rights of the bankrupt and the creditors are fixed by the terms of the offer; and that upon the confirmation of the composition they get what they 'bargained for,' and no more."

The language employed by this Court in describing the nature of a composition in the two foregoing cases may accurately be employed in defining the true nature of an arrangement under Chapter XI. While an arrangement is pending before creditors for consideration, proceedings partake more of the nature of contractual negotiations than of an adversary litigation. By coming forward with a voluntary proposal of arrangement under Section 322, the debtor does not thereby submit his estate and affairs to the Court or the creditors for administration in bankruptcy. The debtor merely submits an offer upon such terms and conditions as the debtor may see fit to prescribe and the creditors can either accept or reject that offer.

It is true that if the proposed arrangement is thereafter withdrawn or abandoned by the debtor before acceptance, or is rejected by the creditors, the debtor runs a risk that the court may, under Section 376 of the Bankruptcy Act, adjudge the debtor a bankrupt and direct that bankruptcy be proceeded with under the general provisions of the Bankruptcy Act. Until this contingency has occurred, however, the proceedings are not truly adversary in character. Even in the case of pending bankruptcy proceedings a debtor may, before or after his adjudication, offer a plan of arrangement (§321), in which case the bankruptcy proceedings as such are suspended and consideration is given to the offer made by the debtor. The adversary bankruptcy pro-

ceedings are reinstated only if the arrangement is withdrawn or abandoned by the debtor, or rejected by the creditors (§376).

Arrangement proceedings under Chapter XI do not under ordinary circumstances contemplate the administration of the debtor's estate in bankruptcy, but merely provide a simple procedure by means of which an offer of settlement may be considered and acted upon by creditors, subject to confirmation of the court. There is, therefore, no valid reason for granting to creditors, through the medium of a Statutory Committee or otherwise, the general powers and rights enumerated on page 11 of the petition. Such a grant would be inconsistent with the nature and purpose of Chapter XI and in direct contravention to the express provisions thereof. If Congress had intended to bestow upon creditors in Chapter XI proceedings broad powers of participation and control, it could have done so by the employment of means and language similar to that used in the enactment of Chapter X.

That Congress did not so intend is indicated not only by the omission from Chapter XI of any provision creating such powers, but also by the careful statutory plan adopted by Congress to preserve and retain the debtor's control over such proceedings.

Chapter XI proceedings are initiated by the debtor through the filing of an arrangement modifying or altering the rights of unsecured creditors upon such terms and for such consideration as the debtor may see fit to offer (§356). The debtor may so initiate these proceedings whether a bankruptcy proceeding is pending (§321) or not (§322). Such proceedings cannot be initiated by anyone other than the debtor. Alterations or modifications in the proposed plan of arrangement may be made only by the debtor (§363).

No creditor or creditors' committee may offer or make any modifications in any plan of arrangement. Chapter XI contains no provision requiring the mandatory appointment of a trustee to take possession of the debtor's estate. On the other hand, although in the discretion of the court a trustee or receiver may be appointed, in most instances the debtor is allowed to remain in possession of his property and in control of his affairs subject to such conditions as may be imposed by the court (§342). Although the plan of arrangement is, of course, submitted to the creditors at a hearing called for the purpose of considering said plan (§§335, 336), the only creditor action which may be taken at such a hearing is the filing of acceptances to the plan or the noting of objections to the confirmation thereof. No provision is made for entertaining suggestions, alterations or modifications by creditors at this or any other hearing.

Acceptances to the plan may be obtained by the debtor either before or after the filing of the petition for an arrangement (§336(4)). It is conceivable, therefore, that if the debtor had obtained the requisite number of acceptances (§362), the arrangement could be confirmed at the very first meeting of creditors. If a majority of creditors accept the plan of arrangement and the court is satisfied that the provisions of Chapter XI have been complied with and that the plan is fair, equitable, feasible and in the best interests of the creditors, and that the arrangement has been proposed and accepted in good faith, the arrangement will be confirmed and bind all creditors affected by it (§366).

This court in *Securities & Exchange Commission* v. *United States Realty & Improvement Company,*

310 U. S. 434, in commenting upon the general nature of Chapter XI, stated at page 450:

> "Every phase of the procedure bearing on the administration of the estate and the development of the arrangement is under the control of the debtor."

At pages 18 and 19 of the petition, petitioners concede that Chapter XI does not contain provisions which impart to it an adversary character unless Sections 337(2) and 338 are liberally construed. It is difficult to conceive why Congress, if it intended arrangement proceedings to be adversary in character, and the Statutory Committee to be the vehicle for imparting such a character to these proceedings, would leave such an important phase of the legislation to implication to be spelled out from the two sections relied upon by petitioners, when Congress took such great pains to impart by appropriate provisions an unquestionable adversary character to Chapters I to VII and Chapter X of the Bankruptcy Act.

The statutory plan adopted by Congress in enacting Chapter X differs radically from that employed in Chapter XI. The principal object of Chapter X proceedings is not to consider a fixed offer of settlement made by the debtor, but rather to effect some plan of reorganization for the debtor whether it be sponsored by the creditors or the debtor or both. A petition for reorganization may be filed either by the debtor or the creditors (§126). Creditors, in the case where the debtor has instituted proceedings, may file answers contraverting the debtor's petition (§137). Provision is made under this Chapter for the disposition by trial of the controversial issues

raised by the creditors' answer (§§144, 145). In all cases where the amount of the indebtedness involved exceeds $250,000 the appointment of a Trustee is required (§156). The Trustee when appointed is given broad inquisitorial and visitatorial powers (§§167(1), (2), (3)) and must prepare and file a plan of reorganization or, if unable to do so, report the reasons why a plan cannot be effected (§169). Creditors are given the right to submit suggestions for the formulation of the plan (§169) and may submit modifications or amendments to the plans proposed by the Trustee, or may submit an entirely new plan (§§169, 222). Creditors are given the right of full participation in all proceedings had under this Chapter (§206) and may under certain circumstances be permitted to intervene as parties (§207). Provision is made for the intervention of the Securities and Exchange Commission as a party representing the interests of the public, and widely scattered creditors (§208). Broad provisions are made for compensation and allowances to be paid to such creditors as may appear and participate in the proceedings (§§216(3), 221(4)).

Under Chapter X, therefore, where the proceedings involve the administration of the debtor's estate, and go beyond the simple consideration of a plan offered by the debtor to his creditors, Congress properly vested full and adequate rights of participation and control in the creditor group and provided for the granting of compensation to such creditors as may have rendered services in connection with the conduct of the reorganization proceedings. That Congress did not do likewise under Chapter XI was not due to an oversight on its part, but rather to full realization of the radical difference in the nature of

the two proceedings. This Court, should not sanction any argument which requests it, as does the petitioners' argument in the present case, to revamp the entire statutory plan of Chapter XI and insert therein a right of creditor participation which does not logically belong there, and for which Congress did not provide.

In its opinion, the Circuit Court made the following statement (R., p. 264, 117 Fed. (2d) 220):

> "Though Chapter XI does amplify the former composition proceedings, nevertheless, it still proceeds as an offer by a debtor of a plan for the adjustment of his debts, and it can proceed in no other way. To aid the creditors in considering the offer a single creditors' committee may be appointed to advise, without compensation."

The committee to which the Circuit Court here referred was the Statutory Committee appointed pursuant to §338. This section provides in substance that if a creditors' committee has not already been appointed under the Act, the creditors at the first meeting may appoint a committee. Section 337(2) provides that the debtor shall be required to pay the administration cost and expenses incurred in the proceedings, and in connection with the arrangement by the Committee of creditors so appointed, and the agents or attorneys for such Committee.

It is to be noted that under §338 the appointment of the Statutory Committee takes place after the plan of arrangement has been proposed by the debtor. When the Statutory Committee is appointed therefore, it has before it for consideration a concrete proposal which only the debtor can alter, modify or

change. So far as the creditors are concerned, and in the absence of consent on the part of the debtor, the original proposal must be accepted or rejected. It has been pointed out that under these circumstances the role of the creditor in Chapter XI proceedings is a comparatively passive one. The Circuit Court in keeping with the true status of creditors in Chapter XI proceedings held that the function of a Statutory Committee was primarily advisory, and that the Statutory Committee corresponded to the committee authorized by Section 44 (b) in ordinary bankruptcy proceedings (R., p. 264).

Section 338 states that a committee may be appointed if one has "not already been appointed under the Act". The only possible committee to which this could have reference is one appointed under Section 44 (b) of the Bankruptcy Act. Two District Court decisions have so construed this section (*Re Max Fishman, Inc.,* D. C. N. Y. 27 Fed. Supp. 33 and *Re Credit Service, Inc.,* D. C. Md. 31 Fed. Supp. 979).

Petitioners argue that if the Statutory Committee be deemed to correspond literally with a committee appointed under Section 44 (b), then the activities of such committee would be limited to "submitting to the court any question affecting the administration of the estate" since the two remaining statutory functions of the committee appointed under Section 44 (b) presuppose the existence of a trustee (Pet., p. 14). It is respectfully submitted that such is not a proper interpretation of the Circuit Court's opinion. The Circuit Court did state the Statutory Committee corresponded to a "44 (b) committee". This statement does not mean that the two committees were one and the same, or that their functions were literally the

same. The Circuit Court's opinion can fairly be interpreted to mean only that the Statutory Committee was of the same general character as the 44 (b) committee which is essentially an advisory committee.

In keeping with its ruling that the Statutory Committee represented the creditors and not the debtor, the Circuit Court properly denied compensation to any agents of the Statutory Committee for solicitation of assents to the proposed plan (R., p. 265). Such services are not services performed in furtherance of the Committee's duty to advise the creditors with respect to the debtor's arrangement, or to aid creditors in passing judgment thereon, but are services rendered primarily in the interest of promoting the debtor's plan.

Throughout the petition, and particularly on pages 17 and 18 thereof, petitioners stress the fact that if arrangement proceedings are not made adversary in character the door will be opened to "extensive fraud and chicanery". This fear of petitioners is wholly unfounded. No arrangement proceeding can be confirmed until the Court is first satisfied that the provisions of Chapter XI are complied with, that the arrangement is fair, equitable and feasible and in the best interests of creditors, and that its proposal and acceptance have been made in good faith and not procured by any means, promises or acts forbidden by the Bankruptcy Act. Moreover, it must be shown to the satisfaction of the Court that the debtor has, not been guilty of any acts, or failed to perform any of the duties which would be a bar to the discharge of a bankrupt (§366).

Adequate provision is made under §386 for the setting aside of an arrangement upon the application of any party in interest within six months after such

arrangement has been confirmed, where fraud has been found to exist.

Appropriate provisions are contained in §376 for forcing of the debtor into bankruptcy where the arrangement is withdrawn or abandoned by the debtor or rejected by the creditors. Moreover, under the administration of the courts, composition proceedings have been successfully conducted for many years prior to the enactment of Chapter XI under statutes wholly lacking the adversary character which petitioners now insist should be given by this Court to Chapter XI, although Congress did not so provide. There is no reason now to anticipate the sudden introduction of "fraud and chicanery" into Chapter XI proceedings.

It may well be that the petitioners' attempt to recast Chapter XI, and to cloak it with an adversary character similar to that of Chapter X is prompted by a desire to adapt Chapter XI to a situation which it may not have been originally designed to cover.

The Circuit Court commented upon this phase of the case (R., p. 258, 117 F. (2d) 218) in the following manner:

> "Had these proceedings occurred after the Supreme Court had clarified the procedure and explained the limitations of Chapter XI proceedings in *Securities & Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U. S. 434, 60 S. Ct. 1044, 84 L. Ed. 1293, it seems clear that this company in all probability would have been reorganized under Chapter X, 11 U. S. C. A. §501 *et seq.*, not 'arranged' as here, and that these various committees would have been spared the disappointment which is now theirs."

As pointed out at page 4 of this brief, the order of confirmation was entered upon consent approxi-

mately ten months prior to the aforesaid decision of this Court, and the arrangement was finally consummated three months before that decision was rendered. Accordingly, the Circuit Court properly decided (R., p. 259, 117 Fed. (2d) 219)

> "however, much we may sympathize with them in a situation which seems to have developed because of the laws' uncertainties, clearly we must treat the proceedings as legally under Chapter XI, and controlled by the provisions of that chapter."

Petitioners cannot properly, even to alleviate what may appear to be a legal hardship, request this Court to completely change the nature of Chapter XI so that these petitioners may have relief which might have been available to them under Chapter X.

POINT II.

The Circuit Court properly denied compensation to petitioners based upon services rendered by informal committees prior to the appointment of the Statutory Committee.

As one of the grounds urged for the granting of the writ herein, petitioners in Point II of their brief (p. 20) assert that the Circuit Court erred in promulgating the general rule that expenses incurred prior to the appointment of the Statutory Committee are not allowable. It is true that the Court in its opinion made the following statement (p. 221):

> "* * * We think expenses incurred prior to the Committees' appointment are not allowable, since they are designed to facilitate advance acceptance

of the plan rather than to aid impartial judgment upon it."

The Circuit Court, however, denied the petitioners' application for compensation in so far as it was based upon services rendered by the "Hanson" and "Wales" committees prior to the appointment of the Statutory Committee, upon the ground that such services were in fact rendered with the intention of facilitating advance acceptance of the plan (R., p. 258). The Circuit Court points out that the Statutory Committee in accepting the prior services of the "Hanson" and "Wales" committees adopted the view of the debtor, and supported the same against general creditor interests (R., p. 265). Any argument based upon what may be the proper disposition of various types of services which may be rendered before the Statutory Committee's appointment, such as appears in petitioners' brief at page 20, becomes academic in view of the specific finding by the Circuit Court that in this particular case the prior services were designed to facilitate advance acceptance of the plan.

However, the general rule adopted by the Circiut Court is itself wholly proper without regard to the particular circumstances of the present case. Section 337 (2) in providing that the Statutory Committee might be compensated for the expenses of its agents, reasonably contemplated that such agents would be appointed and would render their services after the appointment of the Statutory Committee, and after the debtor had submitted a definite plan of arrangement (*Re Max Fishman, Inc.*, D. C. N. Y. 27 F. Supp. 33).

As a practical matter, it is hardly likely that services performed before the appointment of the

Statutory Committee, would be services motivated by an intention to aid such Committee when formed, in the performance of its function of advising creditors and assisting such creditors to formulate their judgment with respect to the arrangement. It is far more likely that such services would be motivated by the purpose suggested by the Circuit Court.

Chapter XI contains no language recognizing any creditor activity prior to the appointment of the Statutory Committee, nor is it possible that there should be any proceedings whatsoever until the same had been initiated by the debtor's filing of an arrangement. If Congress had intended that services might be rendered prior to the appointment of a Statutory Committee, and the debtor thereafter be compelled to pay for the same, it is again likely to suppose that appropriate language would have been included in Chapter XI.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

HENRY M. WISE,
Counsel for Respondent.

On the brief:
JOHN W. KELLY,
FRANK J. PODESTA.

Appendix A.

The Bankruptcy Act, as amended by the Act of June 22, 1938:

Sec. 337 At such meeting, or at any adjournment thereof, the judge or referee shall, after the acceptance of the arrangement—

* * * * * * * * *

(2) fix a time within which the debtor shall deposit, in such place as shall be designated by and subject to the order of the court, the consideration, if any, to be distributed to the creditors, the money necessary to pay all debts which have priority, unless such priority creditors shall have waived their claims or such deposit, or consented in writing to any provision of the arrangement for otherwise dealing with such claims, and the money necessary to pay the costs and expenses of the proceedings and the actual and necessary expenses incurred in connection with the proceedings and the arrangement by the committee of creditors and the attorneys or agents of such committee, in such amount as the court may allow;

* * * * * * * * *

Sec. 338 At such meeting the creditors may appoint a committee, if none has previously been appointed under this title, and, if a trustee has not previously been appointed, may nominate a trustee who shall thereafter be appointed by the court in case it shall become necessary to administer the estate in bankruptcy as provided under this chapter.